78-1882

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 76-496

BENSON A. WOLMAN, *et al.*,

Appellants,

—v.—

FRANKLIN B. WALTER, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JURISDICTIONAL STATEMENT

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-vs-
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Appellees.

On Appeal From The United States District Court For The Southern District of Ohio, Eastern Division

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JURISDICTIONAL STATEMENT

Appellants (plaintiffs in the court below) appeal from the order of the United States District Court for the Southern District of Ohio, Eastern Division, entered by a three-judge court on March 21, 1979, denying plaintiffs' motion for a mandatory injunction requiring the defendant-appellees to terminate the loan of equipment and

materials purchased with state funds for use in parochial schools pursuant to Ohio Revised Code §§ 3317.06(B) and 3317.06(C). Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The order and opinion below are not reported. They are set out in the Appendix, infra, pp. A1-A4.

JURISDICTION

This appeal arises from proceedings on remand to the District Court from this Court's decision in Wolman v. Walter, 433 U.S. 229 (1977).

On June 24, 1977, this Court rendered its opinion, in Wolman v. Walter, supra, that Ohio Revised Code § 3317.06, which provided assistance to private sectarian education in Ohio, was partially invalid under the Establishment Clause. Among the programs struck down was the loan of materials and equipment purchased with tax funds to pupils enrolled in nonpublic

schools or to their parents, pursuant to §§ 3317.06(B) and (C). This Court partially affirmed and partially reversed the decision of the three-judge district court which had upheld the entire statute on July 21, 1976. This Court's order, entered June 24, 1977, remanded this case to the District Court for further proceedings in conformity with this Court's opinion of that date.

On February 1, 1978, the three-judge court entered its initial judgment on remand (a copy of which is appended at pp. A5-A7, infra). It declared the partial invalidity of § 3317.06 and permanently enjoined the future expenditure of funds under the invalid portions of the statute. The District Court expressly refrained from deciding whether the equipment or materials already on loan and in the possession of the sectarian schools should be returned, specifically reserving jurisdiction to entertain further applications for relief on this issue.

On February 28, 1978, the appellants submitted a motion for a mandatory injunction to compel the return of the equipment and materials to the public so as to terminate the unconstitutional loans. This

motion was considered by the same three-judge panel which rendered the initial judgment in this case. On March 21, 1979, that three-judge court announced its opinion and order denying the injunction. Appellants filed their notice of appeal to this Court on April 18, 1979 (A18).

Jurisdiction of this appeal is conferred by 28 U.S.C. §§ 1253 and 2281 (in effect with respect to matters commenced prior to August 12, 1976, § 7 of Pub. L. 94-381). Standing is established under Flast v. Cohen, 392 U.S. 83 (1968).

STATUTE INVOLVED

Section 3317.06 was signed into law on August 29, 1975. Subsection (B) of the statute authorized school districts "to purchase and to loan to pupils attending nonpublic schools . . . or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program." Subsection (C) is similarly

worded, but authorized the lending of "equipment" rather than materials. The statute, as reenacted in 1978, with Subsection (B) and (C) unchanged, is appended at pp. A8-A14, infra.

QUESTION PRESENTED

After this Court has held that publicly funded loans of instructional equipment and materials for use in private sectarian schools violate the Establishment Clause, does a District Court abuse its discretion and commit constitutional error when it refuses to enjoin such loans, where the plaintiffs promptly and diligently sought injunctions against the implementation of the unconstitutional program, and where the private schools incurred no detrimental reliance?

STATEMENT OF THE CASE

This action was commenced on November 18, 1975, shortly after the enactment of § 3317.06. The defendants include the Superintendent of Public Instruction, who is the chief executive and administrative officer of the State Department of Education

and the chief administration officer of the State Board of Education; the State Board of Education; the Treasurer and the Auditor of the State of Ohio; the Board of Education of the City School District of Columbus, Ohio; and the parents of several pupils enrolled in sectarian nonpublic schools in the state.

On December 10, 1975, the District Court granted the plaintiffs' motion for a temporary restraining order (modified by consent on February 13, 1976, to permit textbook loans). The order restraining expenditure of funds for the loan of equipment and material remained in effect until the Court below entered judgment for the defendants on July 21, 1976. On July 28, 1976, plaintiffs moved in the District Court for reinstatement of the injunction pending review by this Court. That motion was denied on August 5, 1976. Further applications for injunction pending an appeal to this Court were denied by Mr. Justice Stewart on August 19, 1976 and by Mr. Justice Marshall on August 25, 1976.

THIS COURT'S RULING ON LOANS OF EQUIPMENT AND MATERIAL

In Wolman v. Walter, 433 U.S. 229 (1977), this Court struck down 3317.06(B) and (C), holding that, notwithstanding the channeling of the loaned materials and equipment to pupils and parents, which distinguished these programs from those previously invalidated, "the program is in substance as before. . ." Id. at 250. "In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." Id. Accordingly, this Court held that "the loan . . . had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." Id. (Emphasis added).

THE MOTION FOR AN ORDER COMPELLING RETURN OF EQUIPMENT AND MATERIALS

The motion for mandatory injunction, the denial of which is the basis of this appeal, contained three separate requests for relief.

First, the motion demanded that the Columbus Board of Education be required to terminate all outstanding loans and recover possession of the materials and equipment on loan within its city school district. Second, it demanded that the defendant Superintendent of Public Instruction and the State Department of Education be ordered to rescind the guidelines authorizing the loans, account for the funds expended and loans made, and adopt guidelines for the termination of outstanding loans and restoration of the loaned materials and equipment. Third, it demanded that the State Auditor and the State Treasurer be required to take all steps within their authority to recover for the state treasury the value of the loaned property, and specifically that the Auditor, in his next regular audit of the school districts, be required to ascertain and assure that the loaned property was restored to public custody and possession. A copy of the motion is appended at pp. A15-A17, infra.

THE RULING BELOW

The court below construed Appellants' motion for termination of the impermissible

loans as a demand for "retroactive relief" (App. p. A4). While the District Court's opinion made passing reference to the conclusion that "with the exception of the Columbus School Board, the defendants are not the most appropriate parties for achieving the physical return of the materials and equipment" (App. p. A3), it ultimately grounded its opinion on three factors which it deemed to militate against "retroactive relief": (a) the equipment to be returned was subject to "eventual obsolescence" (id. at A4); (b) the "denial of retroactive relief" would "obviate any risk of unconstitutional entanglement with nonpublic school personnel by public officials" (id. at A4); and (c) the materials loaned to the sectarian schools were duplicative of such items available in the public schools, so that, presumably, there would not be much point in making the sectarian schools return the equipment (id. at A4). There was no factual record to support any of these conclusions. Permitting the loans to remain outstanding is constitutionally invalid.

THE QUESTION IS SUBSTANTIAL

I. The Relief Sought Is Not Retroactive; The Denial of the Injunction Converts An Unconstitutional Loan Into a More Flagrantly Unconstitutional Grant.

Contrary to the characterization by the District Court, there is nothing "retroactive" about returning loaned property to the lender when a loan has ended. Indeed this is the normal termination of a loan and the usual expectation of the parties, if they are in good faith. This feature, in gratuitous transactions, normally distinguishes a loan from a gift or a grant. The drafters of § 3317.06 must have determined to lend materials rather than to give them to the parochial institutions because they mistakenly believed a loan to be more likely to withstand First Amendment scrutiny. The District Court's refusal to compel the defendants to end these loans after this Court's holding makes permanent a form of aid to religion which this Court refused to permit even on a temporary basis--in effect, it converts these loans to outright gifts of instructional materials

and equipment to the sectarian schools where they are housed.

This mandatory injunction is in no sense similar to the retroactive relief this Court considered inappropriate in Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II). In that case, state reimbursement to parochial schools for secular educational services in the 1970-71 school year was permitted notwithstanding this Court's ruling in Lemon v. Kurtzman, 403 U.S. 602 (1971) (Lemon I) in June, 1971, that such reimbursements violated the Establishment Clause. The reimbursement was clearly for a period prior to the invalidation of the outstanding program. In the present case, the continuation of the outstanding loans is an ongoing violation. Cf. New York v. Cathedral Academy, 434 U.S. 125, 134 (1977).

II. Equitable Considerations Require, Rather Than Prevent, The Termination of The Equipment and Material Loans.

In Lemon II, the consideration this Court found inimical to retroactive relief was "expenses incurred by the schools in reliance on the state statute inviting the

contracts made and authorizing reimbursement . . ." 411 U.S. at 203. The significance of this reliance by defendants was reinforced by plaintiffs' "tactical choice not to press for interim injunctive suspension of payments or contracts. . ." Id. at 204.

In the present case, there was no detrimental reliance. The sectarian school systems had no reason to expect that the lending programs would be perpetual. They incurred no significant expense in accepting the loans. Appellants repeatedly sought interim relief, from the inception of this litigation through review by this Court. Further, the programs at issue here were sufficiently similar to those invalidated in Meek v. Pittenger, 421 U.S. 349 (1975) to place all concerned on notice of the strong possibility that they would be struck down.

Requiring the return of the materials and equipment on loan causes no inequity to the parochial schools or those who attend them. The basic inequity in the District Court's decision is that it permits the state to give religious institutions that which the First Amendment

prohibits the state even to lend them.[1/]

In New York v. Cathedral Academy, 434 U.S. 125 (1977), this Court rejected the idea that Lemon II stands for the proposition that "every unconstitutional statute, like every dog, gets one bite. . ." Id. at 130. The Cathedral Academy opinion noted that the reimbursement continued in Lemon II was not per se violative of the Establishment Clause; rather, by the time of Lemon II, the excessive entanglement was held to have already occurred and therefore could not be undone by withholding final reimbursement for programs conducted prior to their invalidation.

The present case presents an opposite pattern. Under the Ohio program of loans of equipment and materials, there were no entangling safeguards. The loans themselves constituted impermissible aid to the religious segment of the curriculum

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[1/] The conclusion of the District Court that the equipment and materials duplicate those in the public schools does not affect the equity of requiring them to be returned. Such items could be sold for the benefit of the public.

which, as in Meek v. Pittenger, 421 U.S. 349 (1975), is inextricably intertwined with the balance of the program. Id. at 366. In other words, the loans themselves violate the First Amendment. Unlike the excessive entanglement presented in Lemon II, this impermissible aid to religion is ongoing. It easily can be ended by terminating the loans. Like the reimbursement scheme held properly enjoined in New York v. Cathedral Academy, supra, the continuation of the loan programs in this case "amounts to a new and independently significant infringement of the First and Fourteenth Amendments." 434 U.S. at 134.

III. The Proper Defendants Are Before The Court; Effective Relief Can Be Granted.

A. The defendant Columbus Board of Education can be compelled to collect the materials and equipment.

The District Court, even while expressing the view that the named defendants generally were not best suited to achieving the physical return of the equipment and materials, acknowledged that this observa-

tion did not apply to the Columbus Board of Education. App. p. A3. Had the opinion below turned on the sufficiency of the parties, rather than on equitable considerations, the District Court would evidently have granted the requested relief against the Columbus Board of Education. As the direct lender of the equipment and materials outstanding in the parochial schools within the Columbus City School District, this defendant is in a position to call its loans. There is no impracticality in requiring it to do so.

B. The state officers who are defendants have the authority to implement the termination of the loan of equipment and materials.

The State Auditor routinely audits the boards of education pursuant to Ohio Revised Code Sections 117.09 and 117.10. The biennial inspection provision applies to boards of education. See, e.g., State ex rel. Board of Education v. Board of Education, 65 Ohio App. 273, 29 N.E.2d 878 (Montgomery, 1939). The auditor's Bureau of Inspection and Supervision of

Public Offices has the duty to report on the status of the accounts of all public offices; the report must describe "any public property converted or misappropriated." Ohio Revised Code § 117.10. Appropriate civil actions must be commenced for the recovery of any such property. Id.

An order requiring the State Auditor to treat the equipment and materials in the custody of nonpublic elementary and secondary schools as public property subject to the accounting, reporting and recovery procedures of his office would constitute an effective statewide remedy for the continuing violation of the First Amendment involved in this case.

The defendant State Board of Education also possesses broad statutory authority sufficient to end the unconstitutional loans. The State Board of Education has authority to formulate policy for the public schools. Ohio Revised Code § 3301.07(A). It is required to "administer the educational policies of this state relating to . . . instructional material building and equipment. . ." Ohio Revised Code § 3301.07(B). It may "prescribe. . . systems of accounting" and "may require

county auditors and treasurers, boards of education, clerks of such boards, teachers and other school officers and employees, to file with it such reports as it may prescribe relating to . . . funds, or to the management and conditions of such funds." Ohio Revised Code § 3301.07(C).

The District Court failed to explain its conclusion that these defendant state officers are not those defendants best suited to achieve the return of the loaned public property. It would seem preferable and more efficient to require these state officers to take appropriate steps to recover the loaned property, rather than to attempt direct judicial enforcement of a federal injunction against every local school board and every parochial elementary and secondary school within Ohio.

Because of the refusal of the District Court to order the defendants to terminate the outstanding loans, the school authorities have had no occasion to demand that the bailees of the equipment and materials return them, and the sectarian institutions holding this property have had no occasion to tender it back to the public. It is premature to assume, as the court below

evidently implied, that process must be sought against each person with custody of an item of loaned material or equipment. If the state officers who are defendants in this action are ordered to cause the termination of these loans, the property on loan will be returned to the public school districts in an orderly manner. The private educational institutions which are holding the materials and equipment are presumably law-abiding organizations.

In short, the defendants had ample authority to put the unconstitutional lending scheme into effect; they were adequate defendants for the adjudication of its Establishment Clause invalidity; and they have the power and authority to end that scheme now that it has been held unconstitutional. They should be ordered to do so. The District Court's refusal to enter such an order presents an important question concerning the discretion of a District Court to decline to enjoin clear violations of the Establishment Clause.

CONCLUSION

For the foregoing reasons appellants respectfully urge the Court to note jurisdiction and grant plenary review of this appeal.

Respectfully submitted,

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Dated June 14, 1979

Appendices

OPINION AND ORDER IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

No. C-2-75-792

BENSON A. WOLMAN, et al.

Plaintiffs,

-vs-

MARTIN W. ESSEX, et al.

Defendants.

This matter is before the Court on the plaintiffs' motion for the issuance of a mandatory injunction (1) requiring the Columbus Board of Education to recover possession of all items of equipment and materials presently on loan pursuant to § 3317.06(B) and (C), O.R.C., to pupils attending non-public schools throughout the State of Ohio, (2) requiring the Ohio Board of Education and its officials to promulgate guidelines governing the restoration of such property to the public school districts of the state, and to make an accounting of all monies expended and loans made pursuant to the loan statutes, and (3) requiring defendants Donahey and Ferguson, the Treasurer and Auditor of the state respectively, "to take all steps within their lawful authority and power to recover to the treasury of the State of Ohio the value of all property now on loan to pupils attending non-public schools." The defendants have filed memoranda in opposition to the motion.

Shortly after this action was initially filed, this Court entered a temporary restraining order enjoining the named defendants from expending any funds or otherwise implementing any aspect of §3317.06, O.R.C. Subsections (B) and (C) of that statute authorized the local school districts to lend secular instructional material and equipment to non-public school children or to their parents. With a modification not pertinent here, the injunction remained in effect until July 21, 1976 when this three judge court ruled that the statute was in all respects constitutional.

On June 24, 1977, the United States Supreme Court, on appeal, affirmed in part and reversed in part that ruling, finding specifically that §3317.06(B) and (C) were unconstitutional as having the primary effect of providing a direct and substantial advancement of sectarian education. Wolman v. Walter, 433 U.S. 229 (1977). Thereafter, on February 1, 1978, this Court declared §3317.06(B) and (C) unconstitutional and permanently enjoined the expenditure of funds and the continuation or implementation of the instructional materials and equipment loan provisions of the statute.

By their motion, plaintiffs apparently seek to recover not only materials and equipment loaned under the statute challenged in this action, but also any equipment loaned pursuant to the predecessor statute declared to be unconstitutional in an earlier action. Wolman v. Essex, Civil Action C-2-73-292 (S.D. Ohio 1976). This Court first concludes that consideration of the plaintiffs' motion must be restricted to the question of recovery of those materials loaned under the particular statute challenged in this action. Questions

relating to the effect of the declared unconstitutionality of the predecessor statute should more properly have been raised in the earlier action. Accordingly, the Court will consider plaintiffs' motion only insofar as it relates to those materials and items of equipment made available to non-public school children pursuant to §3317.06(B) and (C) during the relatively short period that those provisions were in effect.

The crux of the issue presently before this Court is one of the appropriate scope of equitable remedies. In shaping equity decrees, of course, the trial court is vested with broad discretionary power. Lemon v. Kurtzman, 411 U.S. 192, 200 (1973). See also Public Funds for Public Schools of New Jersey v. Byrne, 444 F. Supp. 1228, 1232 (D. N.J. 1978). The United States Supreme Court has held that courts considering retroactive equitable relief of this type sought here are bound to apply traditional equitable principles of "what is necessary, what is fair, and what is workable." Id. (footnote omitted). See also New York v. Cathedral Academy, 434 U.S. 125, 129 (1977). In short, this Court must now weigh the competing interests of all the parties to the action.

At the outset, the Court observes that the defendants joined as parties by the plaintiffs, with the exception of the Columbus School Board, are not the most appropriate parties for achieving the physical return of the materials and equipment. With this in mind, other factors relevant to the consideration of the motion weigh much more heavily against granting the relief sought by the motion.

The equipment sought to be recovered includes such items as projectors, record players, maps, globes and science kits. All these items, it would seem to this Court, are subject to eventual obsolescence. Thus the risk of further impairment of constitutional interests is inherently limited by the passage of time. Moreover, the denial of the retroactive relief sought by the plaintiffs would obviate any risk of unconstitutional entanglement with non-public school personnel by public officials.

Furthermore, the equipment and materials made available to the non-public students and their parents are, in accordance with the statutory scheme, necessarily duplicative of equipment and materials already available in the public schools of each school district. Thus, when balanced against the minimal impairment of constitutional interests, the virtual futility of the retroactive relief sought by the plaintiffs assumes much larger proportions.

On balance, then, and considering all the factors involved, the Court determines that its discretion is better exercised in denying the relief requested by the plaintiffs in this motion. Accordingly, plaintiffs motion for a mandatory injunction is hereby DENIED.

(Signed)

John W. Peck, United States Circuit Judge

Joseph P. Kinneary, United States District Judge

Robert M. Duncan, United States District Judge

ORDER IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

No. C-2-75-792

BENSON A. WOLMAN, et al,

Plaintiffs,

-vs-

FRANKLIN B. WALTER, et al,

Defendants.

This matter is before the Court on remand from the Supreme Court of the United States which on June 24, 1977 announced its opinion and judgment affirming in part and reversing in part said previous judgment of this Court, and remanded this cause to this Court for further proceedings in conformity with its opinion.

On due consideration, judgment is hereby rendered as follows:

A. IT IS ORDERED, ADJUDGED AND DECREED THAT Ohio Revised Code §§3317.06(B) (instructional materials loans), 3317.06(C) (instructional equipment loans) and 3317.06(L) (field trip transporation) are hereby declared violative of the First and Fourteenth Amendments of the Constitution of the United States, and the expenditure of funds of the State of Ohio and the continuation or implementation of the programs authorized by said unconstitutional provisions of Section 3317.06 are hereby permanently enjoined.

B. The injunctions granted herein are binding upon the parties to this action, their officers, agents, servants, employees and attorneys and upon those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

C. Except as set forth above, §3317.06 of the Ohio Revised Code, as in effect on July 21, 1976, on its face, is declared to be in conformity with the requirements of the First and Fourteenth Amendments of the Constitution of the United States. Specifically, the purchase and lending of secular textbooks in accordance with §3317.06(A), speech and hearing diagnostic services in accordance with §3317.06(D), physician, nursing, dental and optometric services in accordance with §3317.06(E), diagnostic psychological services in accordance with §3317.06(F), the supply of standardized tests and scoring services in accordance with §3317.06(J), and the provision of therapeutic services in accordance with §3317.06(G), guidance and counseling services in accordance with §3317.06(H), remedial services in accordance with §3317.06(I), and programs for the handicapped in accordance with §3317.06(K) is declared constitutional.

D. One-third of the costs of this action are hereby taxed against the defendants, and two-thirds of said costs are taxed against the plaintiffs.

E. This Court retains jurisdiction of this matter for the purpose of entertaining such further applications for relief which may be necessary or proper to redress the partial invalidity of §3317.06 of the Ohio Revised Code. Without limiting the generality

of the foregoing, the Court refrains from adjudicating, at this time, the obligation of any person to return or seek the return to the public of materials and equipment presently on loan pursuant to 3317.06(B) or (C), and refrains, at this time, from considering whether such adjudication would be appropriate and within the jurisdiction of this Court in the within action. However, this Court retains jurisdiction to consider these issues and any related issues upon proper application.

(Signed)

John W. Peck, United States Circuit Judge

Joseph P. Kinneary, United States District Judge

Robert M. Duncan, United States District Judge

STATUTE INVOLVED

Ohio Revised Code Section 3317.06

§ 3317.06 Distribution of payments for special programs.

Moneys paid to school districts under division (P) of sections 3317.024 [3317.02.4] of the Revised Code shall be used for the following independent and fully severable purposes:

(A) To purchase such secular textbooks as have been approved by the superintendent of public instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents and to hire clerical personnel to administer such lending program. Such loans shall be based upon individual requests submitted by such nonpublic school pupils or parents. Such requests shall be submitted to the local public school district in which the nonpublic school is located. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district. As used in this section, "textbook" means any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends.

(B) To purchase and to loan to pupils attending nonpublic schools within the district or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

(C) To purchase and to loan to pupils attending nonpublic schools within the district or to their parents, upon individual request, such secular, neutral and nonideological instructional equipment as is in use in the public school within the district and which is incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

(D) To provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil receiving the service.

(E) To provide physician, nursing, dental, and optometric services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the nonpublic school pupil receiving the service.

(F) To provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the pupil receiving the service.

(G) To provide therapeutic psychological and speech and hearing services to pupils attending nonpublic schools within the district.

Such services shall be provided in the public school, in public centers, or in mobile units located off the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(H) To provide guidance and counseling services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(I) To provide remedial services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(J) To supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state.

(K) To provide programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school, or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(L) To hire clerical personnel to assist in the administration of programs pursuant to divisions (D), (E), (F), (G), (H), (I), and (K) of this section and to hire supervisory personnel to supervise the providing of services and textbooks pursuant to this section.

Clerical and supervisory personnel hired pursuant to division (L) of this section shall perform their services in the public schools, in public centers, or mobile units where the services are provided to the nonpublic school pupil except that such personnel may accompany pupils to and from neutral service sites when necessary to ensure the safety of the children receiving the services.

Health services provided pursuant to divisions (D), (E), (F), and (G) of this section may be provided under contract with the state department of public health, city, or general health districts or other private agencies whose personnel are properly licensed by an appropriate state board or agency.

Transportation of pupils provided pursuant to divisions (G), (H), (I), and (K) of this section shall be provided by the public

school district from its general funds and not from moneys paid to it under division (P) of section 3317.024 [3317.02.4] of the Revised Code unless a special transportation request is submitted by the parent of the child receiving service pursuant to such divisions. If such an application is presented to the local public school district, it may pay for the transportation from moneys paid to it under division (P) of section 3317.024 [3317.02.4] of the Revised Code.

The duties of clerical personnel, hired pursuant to divisions (B) and (C) of this section, shall include distribution of loan request forms, receipt and cataloging of loan requests, inventory of instructional materials and instructional equipment, distribution of instructional materials and instructional equipment to pupils or their parents, retrieval of such instructional materials and instructional equipment, and maintaining custody and storage of these items. The instructional material and instructional equipment authorized to be loaned pursuant to divisions (B) and (C) of this section may be stored on the premises of the nonpublic school of attendance and the clerical personnel hired for administration of the lending program may perform their services upon the premises of the nonpublic school when in the determination of the state department of education, it is necessary and appropriate for efficient implementation of the lending program.

No school district shall provide health or remedial services to nonpublic school pupils as authorized by this section unless such services are available to pupils attending the public schools within the district.

Health and remedial services and instructional materials and equipment provided for the benefit of nonpublic school pupils pursuant to this section and the admission of pupils to such nonpublic schools shall be provided without distinction as to race, creed, color, or national origin of such pupils or of their teachers. No instructional materials or instructional equipment shall be loaned to pupils in nonpublic schools or their parents unless similar instructional materials or instructional equipment are available for pupils in the public schools of the school district.

No school district shall provide services, materials, or equipment for use in religious courses, devotional exercises, religious training, or any other religious activity.

As used in this section, "parent" includes a person standing in loco parentis to a child.

Notwithstanding section 3317.01 of the Revised Code, payments shall be made under this section to any city, local, or exempted village school district within which is located one or more nonpublic elementary or high schools.

The allocation of payments for textbooks, instructional materials, instructional equipment, health services, and remedial services to city, local, and exempted village school districts shall be on the basis of the state board of education's estimated annual average daily membership in nonpublic elementary and high schools located in the district.

Payments made to city, local, and exempted village school districts under this section shall be equal to specific appropriations made for the purpose.

The department of education shall adopt guidelines and procedures under which such programs and services shall be provided, under which districts shall be reimbursed for administrative costs incurred in providing such programs and services, and under which any unexpended balance of the amounts appropriated by the general assembly to implement this section may be transferred to the auxiliary services personnel unemployment compensation fund established pursuant to section 4141.47 of the Revised Code. Within thirty days after the end of each biennium, each board of education shall remit to the department all moneys paid to it under division (P) of section 3317.024 [3317.02.4] of the Revised Code that are not required to pay expenses incurred under this section during the biennium for which the money was appropriated.

Funds distributed pursuant to this section shall not exceed specific appropriations made therefor by the general assembly, unless expressly approved by the emergency board or the controlling board.

[End of Section 3317.06]

MOTION FOR ORDER COMPELLING RETURN OF EQUIPMENT AND MATERIALS IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

No. C-2-75-792

BENSON A. WOLMAN, et al,

Plaintiffs,

-vs-

FRANKLIN B. WALTER, et al,

Defendants.

Plaintiffs respectfully move the Court for an order of mandatory injunction as follows:

(a) requiring the defendant Board of Education of the city school district of Columbus, Ohio to terminate all outstanding loans of equipment and materials to pupils attending non-public schools, or their parents, pursuant to Ohio Revised Code Sections 3317.06(B) and 3317.06(C) (hereinafter sometimes called "loan statutes"), and requiring said Board of Education to recover possession of all items of equipment and materials presently on loan pursuant to the loan statutes; and

(b) requiring the defendants Franklin B. Walter, Superintendent of Public Instruction of the State of Ohio and the State Board of Education to rescind the guidelines of the State Department of Education authorizing the lending of equipment and materials pursuant to the loan statutes, to make an accounting of

all monies expended and loans made pursuant to the loan statutes, and to adopt guidelines for the termination of such loans and the restoration to the public school districts of the State of Ohio of all property presently on loan pursuant to the loan statutes; and

(c) requiring the defendants Gertrude W. Donahey, Treasurer of the State of Ohio, and Thomas E. Ferguson, Auditor of the State of Ohio to take all steps within their lawful authority and power to recover to the treasury of the State of Ohio the value of all property now on loan to pupils attending non-public schools, or their parents, pursuant to the loan statutes; without limiting the foregoing demand for relief, requiring the defendant Thomas E. Ferguson, Auditor of the State of Ohio, in the course of his next regular audit of each of the school districts of the State of Ohio, to ascertain and assure that all property belonging to the State and/or School District and which may have theretofore been loaned pursuant to the loan statutes has been restored to the custody and possession of the Board of Education.

A memorandum in support of this motion is attached.

Respectfully submitted,

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NOTICE OF APPEAL IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

No. C-2-75-792

BENSON A. WOLMAN, et al,

Plaintiffs,

-vs-

FRANKLIN B. WALTER, et al.,
(formerly Martin W. Essex, et al.),

Defendants.

Notice is hereby given that the plaintiffs hereby appeal to the Supreme Court of the United States from the final judgment and order denying plaintiffs' motion for mandatory injunction entered in this action on March 21, 1979, by a district court of three judges.

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